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Commercial Bribery and the Sherman Act: The Case for Per Se Illegality

FRANKLIN A. GEVURTZ*

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I. INTRODUCTION

When business is conducted through agents, commercial bribery often occurs.¹ Its prevalence results from the economic incentives facing both the agent and those seeking a contract with the principal. As long as the agent has no direct interest in the contract, he might be tempted to deal with individuals based on a side payment. At the same time, such a payment can cost the party seeking the contract far less than by competing through lowering prices or increasing the quality of the product. Given that most large transactions involve government or private organizations that can only operate through agents, the loss of price and quality competition resulting from commercial bribery imposes a significant toll on consumer welfare.²

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1. See, e.g., A. BEQUAI, *WHITE COLLAR CRIME: A 20TH CENTURY CRISIS* 42 (1978) ("In large urban centers like New York, one out of every seven dollars exchanging hands may be tainted with commercial bribery."); M. CLINARD & P. YEAGER, *CORPORATE CRIME* 155-86 (1980) (arguing that commercial bribery is a widespread business practice); Gilman, *Bribery of Retail Buyers Is Called Pervasive*, *Wall St. J.*, Apr. 1, 1985, at 6, col. 1 (bribery of buyers for retail stores is pervasive); Burrough, *Oil-Field Investigators Say Fraud Flourishes, From Wells to Offices*, *Wall. St. J.*, Jan. 15, 1985, at 1, col. 6 (giving bribes and kickbacks to oil company employees is widespread).

2. See, e.g., Gilman, *supra* note 1, at 6, col. 1 (bribery of buyers for retail stores results in the stores paying more for their goods, which in turn cuts their profit and causes them to raise prices to consumers); Burrough, *supra* note 1, at 1, col. 6 (bribes and kickbacks from vendors

Many laws potentially address this practice.³ This article examines one: The Sherman Act.⁴ There are two reasons for focusing on the Sherman Act. First, as this article argues, commercial bribery is an agreement or combination that has the effect of increasing prices and depriving consumers of the advantages of free competition. Hence, it is precisely the sort of conduct that section 1 of the Sherman Act is intended to prohibit.⁵ Second, commercial bribery claims that are predicated on the Act are coming before the courts with increasing frequency.⁶ The decisions in these cases have yielded results and

to oil company employees lead to higher prices for oil field goods and results in thirty to forty percent higher drilling costs in some cases and has increased energy costs for consumers).

3. The penal codes of a large number of states make commercial bribery a crime. *See, e.g.*, N.Y. PENAL LAW §§ 180.00-180.08 (McKinney Supp. 1987). For a listing of state laws that outlaw commercial bribery, see *Perrin v. United States*, 444 U.S. 37, 44 nn.9 & 10 (1979). Several federal statutes may also render commercial bribery criminal under certain conditions. *See, e.g.*, 18 U.S.C.A. § 215 (West Supp. 1987) (bribery of bank employees); 27 U.S.C. § 205(c) (1982) (commercial bribery in the alcoholic beverage industry); 29 U.S.C. § 186 (1982) (payments to labor representatives); 49 U.S.C. § 11907 (1982) (bribery of railroad employees); *see also Perrin v. United States*, 444 U.S. 37 (1979) (crossing state lines to commit commercial bribery may violate the Travel Act, 18 U.S.C. § 1952 (1982)); *United States v. Beckley*, 259 F. Supp. 567 (N.D. Ga. 1986) (bribing employee of telephone company to allow uncharged use of long distance service may violate the wire fraud statute, 18 U.S.C. § 1343 (1982)); *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676 (1942) (using mail to commit commercial bribery may violate the mail fraud statute, 18 U.S.C. § 1341 (1982)). In addition, principals of bribed agents have a common law cause of action against the briber. *E.g.*, *Continental Management, Inc. v. United States*, 527 F.2d 613, 616 (Ct. Cl. 1975). The dishonest agent may also be subject to a common law action by a principal. RESTATEMENT (SECOND) OF AGENCY §§ 403, 404, 404A, 407 (1958). Also, the Federal Trade Commission condemns commercial bribery as an unfair trade practice. 16 C.F.R. § 13.315 (1986). Other sanctions are less direct. The Internal Revenue Code denies a deduction for commercial bribes. I.R.C. § 162(c)(2) (1982). The securities laws may force public corporations to disclose such payments. *See, e.g.*, *SEC v. Jos. Schlitz Brewing Co.*, 452 F. Supp. 824 (E.D. Wis. 1978). Following disclosure, shareholders may bring an action alleging that corporate managers violated their fiduciary duty by engaging in bribery. *See, e.g.*, *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759 (3d Cir. 1974). For further discussion of the various laws employed to attack commercial bribery in both domestic and foreign transactions, see *Gevurtz, The United States Approach to Combating Bribery in the International Sale of Goods*, in *SURVEY OF THE INTERNATIONAL SALE OF GOODS* 333 (1986).

4. 15 U.S.C. §§ 1-7 (1982).

5. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979).

6. *See, e.g.*, *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367 (3d Cir. 1985); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674 (9th Cir.) (per curiam), *cert. denied*, 429 U.S. 940 (1976); *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961); *NL Indus., Inc. v. Gulf & W. Indus.*, 650 F. Supp. 1115 (D. Kan. 1986); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (D. Alaska 1982); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1982); *W.T. Grant Co. v. Christensen*, 1975 Trade Cas. (CCH) ¶ 60,324 (S.D.N.Y. 1975); *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); *Sears*,

methods of analysis that are often inconsistent and usually erroneous. Such doctrinal chaos creates the need for a careful reexamination of the area.

Several features make the Sherman Act particularly attractive for commercial bribery plaintiffs.⁷ These features include access to federal courts, the Act's broad jurisdictional reach,⁸ and perhaps most importantly, the Act's provision for recovery of treble damages.⁹ Two other statutes—the Robinson-Patman Act¹⁰ and the Racketeer Influenced and Corrupt Organizations Act (RICO)¹¹—compete in providing these advantages. Both, however, contain various limitations not found in the Sherman Act.

Section 2(c) of the Robinson-Patman Act proscribes the payment of brokerage fees, commissions, and other compensation to agents in connection with the sale of goods, except for services actually rendered.¹² Although its principal purpose is to prevent the payment of fraudulent commissions and fees as a means of price discrimination,¹³

Roebuck & Co. v. Blade, 110 F. Supp. 96 (S.D. Cal. 1953), *appeal dismissed*, 245 F.2d 67 (9th Cir. 1956).

7. The immediate victims are the principal of the bribed agent and the competitors that were defeated through the practice. For a discussion of who has standing to bring a Sherman Act claim for commercial bribery, see *infra* Section IIIA.

8. The Sherman Act covers conduct undertaken anywhere within the United States as long as the conduct either involves transactions in or substantially affects interstate commerce. *E.g.*, *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). It also reaches activities outside the country if they affect United States imports or exports. *E.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945). For a discussion of the Sherman Act's application to American companies engaged in overseas bribery, see *McManis, Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 *YALE L.J.* 215 (1976); *Rill & Frank, Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act*, 30 *VAND. L. REV.* 131 (1977). For consideration of whether the Sherman Act can reach overseas bribery by foreign businesses when the bribes prejudice American exporters, see *Gevurtz, Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 *VA. J. INT'L L.* 211 (1987).

9. 15 U.S.C. § 15 (1982).

10. 15 U.S.C. § 13(c) (1982).

11. 18 U.S.C. §§ 1961-1968 (1982).

12. Section 2(c) of the Robinson-Patman Act reads as follows:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c) (1982).

13. *E.g.*, *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169 (1960).

courts repeatedly have held that it also prohibits bribery to procure a sale of goods.¹⁴ Because this section reaches only payments made in connection with the sale of goods, it excludes payoffs to obtain a contract for services¹⁵ or a lease.¹⁶ Further, it only reaches conduct by defendants "engaged in commerce, in the course of such commerce."¹⁷ Intrastate or foreign bribery thus may not be covered even if the payoff affects trade between states or between the United States and other nations.¹⁸ Another problem lies in the decision of some courts to limit standing under section 2(c) to the defeated competitor and thereby deny recovery to the defrauded principal.¹⁹ Finally, a number of commentators have suggested that applying the Robinson-Patman Act to claims of commercial bribery would be a perversion of the statute.²⁰ As a result, courts may back away from this interpretation.²¹

14. See, e.g., *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 716 F.2d 245, 246 (4th Cir. 1983); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 696 (9th Cir.) (per curiam), cert. denied, 429 U.S. 940 (1976); *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 856 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 15 (6th Cir. 1943); cf. *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211 (9th Cir. 1980) (action for commercial bribery may be brought under section 2(c) if underlying transaction involved sale of goods, not sale of services).

15. *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214 (9th Cir. 1980); *Stutzman Feed Serv., Inc. v. Todd & Sargent, Inc.*, 336 F. Supp. 417, 419 (S.D. Iowa 1972); see also *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527, 534 (7th Cir. 1974) (holding that title insurance policies are not goods).

16. *Rodman v. Haines*, 1976-2 Trade Cas. (CCH) ¶ 61,074 (S.D.N.Y. 1976). Moreover, section 2(c) requires illegal payments to pass between the buyer and an agent of the seller or a seller and an agent of the buyer. See *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 372 (3d Cir. 1985) (stating that section 2(c) does not apply when the briber distributes goods as an agent for the principal of the bribed employee instead of buying for resale); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 831 (9th Cir. 1971) (finding no liability under section 2(c) for a manufacturer where persons receiving unearned commissions from the manufacturer were not under the control of purchasers or acting on their behalf).

17. 15 U.S.C. § 13(c) (1982).

18. See generally *Gevurtz*, *supra* note 8, at 241-49 (discussing application of section 2(c) to overseas bribery by foreign companies and intrastate bribery).

19. *NL Indus., Inc. v. Gulf & W. Indus.*, 650 F. Supp. 1115, 1123-24 (D. Kan. 1986); *Bunker Ramo Corp. v. Cywan*, 511 F. Supp. 531, 533 (N.D. Ill. 1981); *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339, 1347 (S.D. Tex. 1976). But see *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 639 (D. Alaska 1982) (arguing that competitive injury requirement "improperly restricts standing to sue" under section 2(c)).

20. See, e.g., 2 R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES* § 12.01 (4th ed. 1982); Rill & Frank, *supra* note 8, at 144-49; Zamansky, *Preferential Treatment, Payoffs and the Antitrust Laws: Distortion of the Competitive Process Through Commercial Bribery*, 83 COM. L.J. 558, 563 (1978); Note, *Restraint of Trade—Robinson-Patman Act, Section 2(c)—Seller Who Bribes Buyer's Employee Is Liable in Treble Damages to Competitor Who Lost Business Thereby*, 79 HARV. L. REV. 1531, 1533-34 (1966).

21. While the Supreme Court twice provided dicta favorable to the interpretation that section 2(c) proscribes bribery, it never ruled on the question. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *FTC v. Henry Broch & Co.*, 363 U.S.

A variety of plaintiffs have recently discovered a potential treble damage paradise in the RICO Act. These plaintiffs include victims of commercial bribery.²² Recovery under the RICO Act, however, requires the surmounting of a series of steps that resemble something of a scavenger hunt.²³ For example, a claim based upon one payoff might not survive the requirement that the defendant be shown to have engaged in a pattern of racketeering activity.²⁴ Moreover, many civil claims brought under the RICO Act far exceed the purposes of the legislation.²⁵ Therefore, it may not be too long before Congress retrenches on the private cause of action provided by the RICO Act.²⁶

This leaves the possibility of a treble damage claim based upon the Sherman Act. Although victims of bribery have asserted claims under both sections 1 and 2 of the Act,²⁷ section 2 is less useful because it requires proof that the defendant acquired (or had a dangerous probability of acquiring) monopoly power.²⁸ Accordingly, this

166, 169 n.6 (1960); *see also* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 371-72 (3d Cir. 1985) (questioning whether Congress intended to sweep commercial bribery within the ambit of section 2(c)); Excel Handbag Co. v. Edison Bros. Stores, Inc., 630 F.2d 379, 387-88 (5th Cir. 1980) (refusing to reach the question of whether commercial bribery violates section 2(c)).

22. *See* Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1288 (7th Cir. 1983) (upholding the denial of a motion to dismiss RICO claim based on bribery); NL Indus., Inc. v. Gulf & W. Indus., 650 F. Supp. 1115, 1125 (D. Kan. 1986) (finding no liability under RICO); Callan v. State Chem. Mfg. Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984) (finding liability under RICO); *see also* Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 644 (D. Alaska 1982) (denying plaintiff's motion for summary judgment on RICO claim based on commercial bribery due to inadequate factual record).

23. For an overview of the elements of a RICO Act violation, *see* Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 652-53 (7th Cir. 1984).

24. *NL Indus., Inc.*, 650 F. Supp. at 1127; *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6, 12-13 (W.D. Pa. 1981).

25. *See, e.g.*, *Bast v. A.H. Robins Co., Inc.*, 616 F. Supp. 333, 335 (E.D. Wis. 1985) (RICO claim against manufacturer of Dalkon shield and its insurer); *Congregation Beth Yitzhok v. Brisman*, 566 F. Supp. 555, 557 (E.D.N.Y. 1983) (*dicta*) (dispute between rival factions in a Chassidic congregation).

26. *See generally* Comment, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO?*, 19 Loy. L.A.L. Rev. 851 (1986) (discussing congressional responses to judicial interpretations of RICO).

27. *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1344 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 687 (9th Cir.) (*per curiam*), *cert. denied*, 429 U.S. 940 (1976); *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 795 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961); *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393, 399 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

28. Section 2 makes it unlawful to monopolize or attempt to monopolize any part of trade or commerce. 15 U.S.C. § 2 (1982). Proof of monopolization requires showing the defendant possessed monopoly power in the relevant market. *E.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 380 (1958). The Supreme Court has stated that "[t]he phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless

article focuses on section 1, which prohibits the formation of combinations and conspiracies in restraint of trade.²⁹ The first issue, therefore, is whether commercial bribery presents a combination or conspiracy. Section IIA of this article explores this question. The second and more difficult issue is whether commercial bribery can be considered to be in restraint of trade. This is the subject of Section IIB. Finally, Section III briefly considers two other problems that sometimes arise in cases that involve both commercial bribery and the Sherman Act: Standing and the *Noerr-Pennington* doctrine.

Before turning to an analysis of these elements, it is useful to eliminate one source of confusion that surfaces in some cases in this area: What precisely does one mean by commercial bribery? There is a temptation to lump together under this label all payments or favors made to agents or employees with the hope of gaining a competitive advantage.³⁰ This, however, is far too broad and partially accounts for the reluctance of some courts to recognize a cause of action for commercial bribery under the Sherman Act.

To begin with, there is a key difference between engaging in bribery and providing legal gratuities, entertainment, or campaign contributions. Businesses may (and usually do) provide gratuities, entertainment, campaign contributions, and the like in the hope of disposing the recipient favorably toward them. There must be more

approach so close as to create a dangerous probability of it." *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) (approving trial court's jury instructions). Most courts interpret the dangerous probability standard as requiring proof that the defendant possessed large, albeit not monopoly, power in the relevant market. *See, e.g., Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1368-69 (5th Cir. 1976) (proof that a defendant acquired a twenty percent share of the market did not establish a dangerous probability that the defendant could monopolize the market), *cert. denied*, 429 U.S. 1094 (1977); *United States v. Empire Gas*, 537 F.2d 296, 306-07 (8th Cir. 1976) (proof that a defendant acquired a fifty percent share of the market did not establish a dangerous probability that the defendant could monopolize the market), *cert. denied*, 429 U.S. 1122 (1977). *But see* *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir.) (a dominant position in a market is "not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such" market), *cert. denied*, 377 U.S. 993 (1964). As discussed below, the greatest problem with applying the Sherman Act against commercial bribery lies in establishing an adequate effect on an overall market. *See infra* Section IIB.

29. Section 1 of the Sherman Act reads in part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

30. *See, e.g., Sterling Nelson & Sons, Inc.*, 235 F. Supp. at 400 ("This is a simple case of buying influence, sometimes called commercial bribery . . ."); R. CALLMAN, *supra* note 20, § 12.01 ("Commercial bribery may be defined as the offer of consideration to another's employee or agent in the expectation that the offeree will, without fully informing his principal, be sufficiently influenced by the offer to favor the offeror."); Zamansky, *supra* note 20, at 558 n.5 ("Commercial bribery refers to the business practice of *buying the influence* of a person in a position of authority to induce him to act in a manner favorable to the briber.").

than this, however, to constitute a bribe. An agreement must exist between the payor and the recipient that there will be a *quid pro quo*.³¹ This requirement is not only a traditional element under criminal bribery statutes, but it also makes a great deal of sense when dealing with claims under the Sherman Act. Few agents, or even persons acting on their own behalf, base purchasing decisions entirely upon price and quality. There will almost always be some desire to do business with those who seem more amicable. Attempting to prevent all efforts to influence agents based upon factors other than price or quality thus would be a quixotic exercise.³² The same is not true once an agent specifically agrees to favor one company in exchange for personal consideration. In that event, other factors no longer blend imperceptibly with price and quality competition. Instead, there is a contract to abrogate that competition. Recognition of this difference serves to explain in part and distinguish cases refusing to find a Sherman Act violation based upon the complaint that the successful recipient of a government franchise made campaign contributions to important officials.³³

In addition to defining "bribery," one must specify what is meant by "commercial bribery." Generally, writers use the term to distinguish payoffs to employees and agents in business dealings rather than to government officials performing public duties.³⁴ This is both too narrow and too broad. It is too narrow for present purposes because there is no difference in competitive effect between a payoff to a government contracting official and to a private purchasing agent. It is too broad for careful analysis because it groups together payments

31. See, e.g., *United States v. Brewster*, 506 F.2d 62, 71-72 (D.C. Cir. 1974) (holding that bribery under 18 U.S.C. § 201(c)(1) requires "an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved").

32. It could also fail to satisfy the requirement under section 1 that there be a combination or conspiracy. For a discussion of whether commercial bribery fulfills this requirement, see *infra* Section IIA.

33. See *Bustop Shelters v. Convenience & Safety Corp.*, 521 F. Supp. 989, 994 (S.D.N.Y. 1981) (recognizing distinction); *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350, 358 (N.D. Ill. 1974) (same), *aff'd*, 516 F.2d 220 (7th Cir. 1975); see also *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 342 (9th Cir. 1969) (distinguishing acts taken by elected officials based on personal interest or outside influence from unlawful acts). Of course, if the official agrees to favor the contributor in exchange for the money, then the campaign contribution is a bribe.

34. See Note, *Commercial Bribery: The Need for Legislation in Minnesota*, 46 MINN. L. REV. 599, 599-60 (1962); see also N.Y. PENAL LAW §§ 180.00-180.08 (McKinney Supp. 1987) (limiting definition of commercial bribery to employer-employee and principal-agent relationships); *Perrin v. United States*, 444 U.S. 37, 43-45 (1979) (extending the definition of bribery under Travel Act, 18 U.S.C. § 1952, to include commercial bribery as well as traditional common law bribery, which had previously been limited in application to public officials).

that may have a very different impact on competition. This article, therefore, focuses on what, for want of a better term, I refer to as "classic" commercial bribery: A payment to a private agent or government official made in exchange for the recipient's agreement to have the recipient's principal procure goods or services from the payor rather than from a competitor.³⁵

II. COMMERCIAL BRIBERY AS A COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE UNDER THE SHERMAN ACT

A. *Commercial Bribery as a Combination or Conspiracy*

The first element of a section 1 violation, that there be a combination or conspiracy, poses little difficulty in the event of commercial bribery. The requirement, of course, could be met if two or more independent companies cooperate in a bribery scheme.³⁶ Also, the use of an accomplice or subsidiary to make the payment might suffice, depending upon the continued willingness of courts to recognize intra-enterprise conspiracies.³⁷ The conspiracy, however, need not be manifested in either of these two manners because the agreement between briber and recipient is the relevant combination that restrains trade.

This point seems implicitly recognized by the decisions involving commercial bribery claims based on section 1. Although courts disagree over whether such conduct constitutes a restraint of trade, none suggests that there is not a conspiracy.³⁸ Admittedly, the agreement between briber and buyer's agent does not fit neatly into the traditional categories of either horizontal or vertical combinations (i.e., agreements between competitors or between parties in the distribution

35. In addition, the payment, to constitute a bribe, must be secret from the agent's principal. *E.g.*, *Jaclyn, Inc. v. Edston Bros. Stores, Inc.*, 170 N.J. Super. 334, 354, 406 A.2d 474, 485 (Super. Ct. Law Div. 1979).

36. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962) (evidence was sufficient for jury to decide whether parties violated Sherman Act by conspiring to monopolize commerce in certain ore products); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (parties acting in combination violated Sherman Act by acquiring a monopoly of interstate and foreign commerce in sisal).

37. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984), the Supreme Court held that the coordinated acts of a company and its wholly-owned subsidiary do not constitute a combination or conspiracy under section 1. It left the issue open, however, for non-wholly-owned subsidiaries. Whether agents or accomplices can be considered conspirators for section 1 purposes depends upon their independence. *See Albrecht v. Herald Co.*, 390 U.S. 145, 148-50 (1968); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 469 (1962).

38. *See also Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 266 (D.C. Cir. 1981) (*dicta*) (suggesting that bribery of government officials creates a conspiracy for purposes of section 1), *cert. denied*, 455 U.S. 928 (1982).

chain, respectively).³⁹ Nothing in section 1, however, limits combinations to these two recognized categories. For example, numerous section 1 decisions recognize conspiracies between private firms and government officials (even without bribery).⁴⁰ Further, the Supreme Court has shown a willingness to go beyond these two categories, as well as to stretch facts to find a section 1 combination, if sufficiently anticompetitive conduct is present.⁴¹ Additional support may be found outside the antitrust context for the proposition that an agreement between a briber and a recipient constitutes a conspiracy. For example, in *Dennis v. Sparks*,⁴² the Supreme Court of the United States held that the bribery of a judge constituted a conspiracy in the context of a civil rights action brought under 42 U.S.C. § 1983.⁴³

B. Commercial Bribery as a Restraint on Trade

Having concluded that commercial bribery constitutes a combination or conspiracy, the question becomes whether it can be considered to be in restraint of trade. If the briber creates a monopoly through payoffs, an affirmative answer necessarily results.⁴⁴ Classic

39. For those requiring labels, perhaps such an agreement could be called "quasi-vertical."

40. See *Corey v. Look*, 641 F.2d 32, 36-37 (1st Cir. 1981); *Whitworth v. Perkins*, 559 F.2d 378, 379 (5th Cir. 1977), *vacated mem.*, 435 U.S. 992, *reinstated per curiam*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 587 (7th Cir. 1977), *vacated mem.*, 435 U.S. 992, *reinstated per curiam*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975); *Health Care Equalization Comm. v. Iowa Medical Soc'y*, 501 F. Supp. 970, 992-93 (S.D. Iowa 1980); *Mason City Center Assocs. v. Mason City*, 468 F. Supp. 737, 742 (N.D. Iowa 1979); see also *Parker v. Brown*, 317 U.S. 341, 351-52 (1943) ("[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade . . ."); cf. *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965) (no allegation that the public official was a co-conspirator).

41. See *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968) (finding a conspiracy under section 1 between newspaper and newspaper carriers to solicit away plaintiff's subscribers, who were also named as part of the conspiracy); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 469 (1962) (conspiracy between CBS and two individuals to buy a competing TV station).

42. 449 U.S. 24 (1980).

43. *Id.* at 31-32; see also *People v. Wettengel*, 98 Colo. 193, 58 P.2d 279 (1935) (briber and recipient cannot be convicted of conspiracy to commit bribery because bribery necessarily requires a conspiracy); 11 C.J.S. *Bribery* § 1 (1938) ("[T]he elements of a conspiracy are included within the substantive offense of agreeing to accept a bribe . . .").

44. See *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1352-53 (5th Cir. 1980), *cert. denied*, 450 U.S. 103 (1981); see also *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-702 (1962) (evidence was sufficient to support a verdict that defendants monopolized commerce in vanadium oxide); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (complaint stated a cause of action under the Sherman Act by alleging that defendants conspired to secure a monopoly of interstate and foreign commerce in sisal). Some confusion exists, however, when the briber obtains but does not create a monopoly position through payoffs. This occurs when, for example, the briber makes a payoff to gain an

commercial bribery, however, usually does not produce a market impact that would be sufficient to create a monopoly. Indeed, it may only affect one sale. In that event, the analysis becomes more complicated.

All contracts restrict trade to some extent because parties bound to any agreement lose the freedom of action that they had possessed before entering into the agreement.⁴⁵ Accordingly, courts have interpreted section 1 as prohibiting only those combinations that unreasonably restrain competition.⁴⁶ Under this rule of reason,⁴⁷ courts examine the impact of a challenged contract to determine whether, on balance, it promotes or destroys competition.⁴⁸ Sometimes, however, the effect of the conduct is so plainly anticompetitive, and the practice so lacking of any redeeming virtue, that no elaborate evaluation of its impact is necessary in each case. Courts deem these practices illegal *per se*.⁴⁹ Examples of such practices include horizontal and vertical price fixing,⁵⁰ horizontal division of markets between competitors,⁵¹ certain tying arrangements,⁵² and concerted refusals to deal.⁵³ Such a *per se* rule is applied when courts have enough experience with a

exclusive franchise that would otherwise be awarded to another company. The monopoly exists in that situation with or without the bribe. The payoff simply determines who gets the monopoly. This led at least one court to conclude that such a payoff has no impact on competition. *Bustop Shelters v. Convenience & Safety Corp.*, 521 F. Supp. 989, 997 (S.D.N.Y. 1981); *see also Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794 (7th Cir.) (holding that the award by railroads of an exclusive contract to transfer passengers and their baggage between railroad terminal stations in Chicago to a new company did not violate Sherman Act even though the new company's acquisition of the contract was facilitated by the wrongful conduct of a public official), *cert. denied*, 368 U.S. 994 (1961); *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350, 360 (N.D. Ill. 1974) ("[A] successful franchise applicant does not become a monopolist because another applicant is unsuccessful."), *aff'd*, 516 F.2d 220 (7th Cir. 1975). Such a conclusion, however, confuses the market for the services provided by the franchisee with the market for the exclusive franchise. Bribery destroys competition in the latter market. Whether this raises prices to consumers in the market for the services provided by the franchisee, it deprives the franchisor of the advantages of free competition.

45. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains.").

46. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

47. *See id.*

48. *See, e.g., National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690 (1978).

49. *See Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

50. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

51. *See, e.g., United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

52. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-14 (1984) ("[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere.").

53. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.").

given practice to predict confidently that the rule of reason would condemn it.⁵⁴ When no such confidence exists, courts must examine the competitive effect of the combination under the rule of reason by analyzing the industry, the history of the restraint, and the reasons why it was imposed.⁵⁵

This analytical framework suggests that in determining whether commercial bribery constitutes a restraint of trade, courts must evaluate its effect on competition. By and large, however, courts faced with commercial bribery claims under section 1 have not undertaken such an analysis. Instead, they have applied one of four approaches to the subject, three of which substitute oversimplified categorizations for the sort of economic review demanded by the Sherman Act.

1. THE "SQUARE PEG" APPROACH

One line of cases dealing with commercial bribery and the Sherman Act treats the statute as if it consists of a series of neatly defined cubbyholes into which all violations must fit. Because commercial bribery does not come within the traditional categories, courts subscribing to this view have concluded that it is beyond the Act's reach. This formalistic analysis began with *Parmelee Transportation Co. v. Keeshin*.⁵⁶

Parmelèe arose out of a struggle between two companies that each sought to obtain an exclusive contract from a group of railroads for transporting passengers and baggage between train stations in Chicago.⁵⁷ Instead of having paid an agent of the railroads, as would have been the case if the situation involved classic commercial bribery, the defendant allegedly bribed the Chairman of the Interstate Commerce Commission (ICC).⁵⁸ The Chairman, in turn, offered the railroads favorable consideration of matters pending before the ICC if the railroads granted the contract to the defendant.⁵⁹ After the defendant received the contract, the plaintiff sued. At trial, the district court dismissed the plaintiff's claim as not cognizable under

54. *E.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 9-10 (1979); see also *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977) ("Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.").

55. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

56. 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

57. *Id.* at 795-96.

58. *Id.* at 796.

59. *Id.*

either section 1 or 2 of the Sherman Act.⁶⁰ On appeal, the Court of Appeals for the Seventh Circuit affirmed the district court's decision.⁶¹

Given these facts, the court of appeals' decision may well have been correct.⁶² The Chairman of the ICC may have offered the railroads more favorable treatment than they would have received from a neutral commission. If so, the bribe did not raise the effective price paid by the railroads or in any other way interfere with their obtaining the advantages of free competition. Rather, it simply provided them with an added, albeit illegal, benefit from accepting the defendant's bid. Admittedly, this gave the defendant an unfair advantage over a more scrupulous competitor. The same may be said, however, if the defendant had engaged in illegal conduct that minimized its costs and allowed it to offer a lower price.⁶³ Yet in neither event would there be a restraint of trade. A different situation would have been presented if the Chairman had threatened the railroads with worse treatment than they reasonably had expected from a neutral commission. In that case, the pressure exerted is similar in economic effect to that of an illegal tying arrangement.⁶⁴

Whatever the economic impact of the bribe in *Parmelee*, it is very different from that of classic commercial bribery. Unfortunately, the court never really analyzed the impact of the payoff, but simply characterized it as irrelevant to the Sherman Act.⁶⁵ The result invited subsequent courts to read the opinion as holding that all commercial bribery was outside the statute's reach. This invitation was not long ignored.

60. *Parmelee Transp. Co. v. Keeshin*, 186 F. Supp. 533, 547 (N.D. Ill. 1960), *aff'd*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

61. *Parmelee*, 292 F.2d at 805.

62. The First Circuit criticized *Parmelee* in *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981), pointing out that the two cases relied upon in *Parmelee*—*Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), and *Eastern Railroad Presidents Conference v. Noerr Motor Freights, Inc.*, 365 U.S. 127 (1961)—were inapposite. *Corey*, 641 F.2d at 36 & n.5. The *Apex* decision, in which the Supreme Court decided whether a labor strike could violate the Sherman Act, is confined to the special relationship between organized labor and the antitrust laws. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959). Indeed, the *Apex* Court indicated that section 1 is concerned with combinations that raise prices or deprive purchasers of the advantages of free competition. See *Apex*, 310 U.S. at 500-01. This is the precise effect of classic commercial bribery. *Noerr* involved lobbying efforts to obtain favorable legislation and does not immunize bribery. See *infra* Section IIIB.

63. For example, a company might seek a competitive advantage through cutting costs by ignoring health and safety regulations.

64. See *infra* text accompanying notes 154-56.

65. See *Parmelee*, 292 F.2d at 804.

In *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*,⁶⁶ the United States District Court for the District of Idaho confronted a case involving classic commercial bribery. The defendant in the case bribed an official of the Idaho Department of Fish and Game to influence the department to buy the defendant's fish feed.⁶⁷ After this came to light, a competing seller sued. The plaintiff prevailed upon its claim under section 2(c) of the Robinson-Patman Act,⁶⁸ but the district court rejected the Sherman Act claim.⁶⁹ Citing *Parmelee*, the court stated:

This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act. . . . [T]he Sherman Act must be interpreted in the light of well understood common law doctrines relating to monopolies and restraints of trade such as contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like. Nothing of that kind occurred here.⁷⁰

Satisfied with its victory under the Robinson-Patman Act, the plaintiff opted not to appeal the Sherman Act decision.⁷¹ Thus, the authority of *Sterling Nelson & Sons* is limited. Nevertheless, the Ninth Circuit chose to follow its reasoning in *Calnetics Corp. v. Volkswagen of America, Inc.*⁷²

Calnetics manufactured air conditioning systems for Volkswagen automobiles.⁷³ After Volkswagen acquired a competing air conditioning manufacturer, Calnetics sued on the basis of various alleged anti-trust violations.⁷⁴ Volkswagen counterclaimed, alleging that Calnetics secretly paid the service manager of an independent auto parts distributor a commission on every air conditioner the distributor bought from Calnetics.⁷⁵ Relying on *Sterling Nelson & Sons*, the Ninth Circuit affirmed the district court's summary judgment that dismissed Volkswagen's claims under sections 1 and 2 of the Sherman Act.⁷⁶ The court held that commercial bribery "standing alone" does

66. 235 F. Supp. 393 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

67. *Id.* at 395-96.

68. *Id.* at 396.

69. *Id.* at 400.

70. *Id.*

71. *See Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 854 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

72. 532 F.2d 674 (9th Cir.) (per curiam), *cert. denied*, 429 U.S. 940 (1976).

73. *Id.* at 679-80.

74. *Id.*

75. *Id.* at 680.

76. *Id.* at 688. The court also cited *United States v. Boston & Maine Railroad*, 380 U.S.

not violate the statute.⁷⁷

Calnetics and *Sterling Nelson & Sons*, however, proceed from a fundamentally wrong premise. By its language and through numerous interpretations, section 1 of the Sherman Act is not a statute that reaches only a closed set of traditionally recognized restraints on trade.⁷⁸ Rather, it is a flexible act that requires courts to assess the economic impact of combinations affecting competition. *Calnetics* and *Sterling Nelson & Sons* undertook no such assessment. If they

157 (1965), and *Norville v. Globe Oil & Refining Co.*, 303 F.2d 281 (7th Cir. 1962). *See id.* at 687. Neither case, however, is particularly relevant. *Boston & Maine* contains a statement that bribery "is more remote from an antitrust frame of reference [than from a conflict of interest statute]." 380 U.S. at 162. But the Court made that statement in reviewing whether a person receiving a bribe acquired a "substantial interest" in the company making the payment within the meaning of section 10 of the Clayton Act, 15 U.S.C. § 20 (1982). *See id.* Section 10 is a very narrow provision that prohibits common carriers from buying from related entities without competitive bidding. Thus, the Court's statement is not a general critique on the applicability of antitrust laws to bribery. *See Sterling Nelson & Sons*, 351 F.2d at 857 ("We do not regard the [Court's] observation [in *Boston & Maine*] as a definitive ruling that under no set of circumstances could commercial bribery be violative of any antitrust law."). It also does not show any careful analysis concerning the competitive impact of classic commercial bribery. *Norville* is even less relevant. It was an action brought under section 2(c) of the Robinson-Patman Act in which (despite the plaintiff's use of the term "commercial bribery") there was no bribe. *See Norville*, 303 F.2d at 282.

77. *Calnetics*, 532 F.2d at 687. The court declined to suggest what other conduct combined with commercial bribery would constitute a violation. *Id.* at 687 n.20. In *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (D. Alaska 1982), a federal district court in Alaska dutifully followed the Ninth Circuit opinion in *Calnetics*. *Sears, Roebuck & Co. v. Blade*, 110 F. Supp. 96 (S.D. Cal. 1953), *appeal dismissed*, 245 F.2d 67 (9th Cir. 1956), an earlier district court opinion in the Ninth Circuit, appeared to involve classic commercial bribery. The defendant gave kickbacks to Sears' Los Angeles advertising manager in connection with engraving work under a contract with the defendant. *Blade*, 110 F. Supp. at 98. In dismissing Sears' claim under section 1 of the Sherman Act, the court explained that the complaint contained no allegation of an effect on interstate commerce by any "actual restraint." *Id.* at 100-01. (The opinion is unclear as to whether the court found no impact on interstate commerce for purposes of jurisdiction or no restraint of trade for purposes of a substantive violation.) According to the court, the complaint could not allege an impact on interstate commerce unless it alleged that Sears raised its prices to its customers. *Id.* The court ignored whether Sears, as a consumer itself, paid more or otherwise lost the advantages of competition between suppliers of engraving services. The court did state that Sears made no allegation of price discrimination between itself and other customers of the defendant—a virtually irrelevant point. *Id.* at 100. The court also stated that if the scheme had any effect upon Sears, with its multimillion dollar business, it was "too remote" for the purposes of the Sherman Act. *Id.* at 101. Under this reasoning, firms would be free, for example, to fix prices as long as they make only small sales to very large customers.

78. *See, e.g., Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."); *see also* *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 560 (1st Cir. 1974) ("As the legislative history of the Sherman Act reveals, the draftsmen recognized that there was no finite catalogue of unfair practices which could be the devices of a conspiracy to restrain trade."), *cert. denied*, 421 U.S. 1004 (1975).

had done so, they might have realized that the restraint created by classic commercial bribery is much closer to the traditional categories than they initially suspected.

2. THE UNFAIR PRACTICE APPROACH

Surprisingly, the courts in *Parmelee*, *Sterling Nelson & Sons*, and *Calnetics* overlooked one obvious category into which commercial bribery might fit. They could have treated it as another unfair trade practice that under some circumstances would violate the Sherman Act. The Fifth Circuit, in *Associated Radio Service Co. v. Page Airways, Inc.*,⁷⁹ adopted this very approach.

Associated and Page competed in the business of outfitting private jets with avionics.⁸⁰ Associated sued Page for violating sections 1 and 2 of the Sherman Act by engaging in a series of unfair tactics.⁸¹ These included misappropriating Associated's trade secrets, filing spurious lawsuits against Associated, and secretly paying Associated's employees to perform disloyal acts while still employed by the company and thereupon to quit and join Page.⁸² Most significantly, Page also repeatedly bribed purchasing agents and officials to obtain both domestic and foreign contracts.⁸³ In affirming a jury verdict for Associated,⁸⁴ the Fifth Circuit held that the aggregate effect of Page's actions was sufficient to violate both sections of the Act.⁸⁵

To understand the reasoning and limits of this decision, it is necessary to review the shifting positions that courts have taken over the question of when the Sherman Act forbids unfair trade practices. Such a review begins with *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*⁸⁶ Mitchell Woodbury and Pick-Barth both sold kitchen equipment to restaurants and similar institutions.⁸⁷ Mitchell Woodbury operated in the New England area.⁸⁸ Pick-Barth was a dominant force in the national market, but maintained only a limited presence in New England.⁸⁹ Pick-Barth enticed two of Mitchell Woodbury's key employees to leave their jobs and head an expanded Pick-Barth

79. 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

80. *Id.* at 1345-46.

81. *Id.* at 1348.

82. *Id.* at 1346-47.

83. *Id.* at 1347-48.

84. *Id.* at 1344.

85. *Id.* at 1350, 1356.

86. 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932).

87. *Id.* at 100.

88. *Id.*

89. *Id.*

operation in Boston.⁹⁰ The two employees took with them Mitchell Woodbury customer lists and other trade secrets.⁹¹ They then solicited away many of Mitchell Woodbury's other employees and customers and thus caused a temporary disruption of its operations.⁹² The jury in the resulting lawsuit found that the defendants intended by these acts to eliminate Mitchell Woodbury as a competitor in the kitchen equipment field, but had not achieved that goal.⁹³ Nevertheless, the district court granted judgment for Mitchell Woodbury,⁹⁴ and the First Circuit affirmed.⁹⁵ The First Circuit held that if the purpose of a conspiracy is to eliminate through unfair competition a competitor with a sizable share of the market, the conspiracy violates section 1 even if it fails in its objective and does not cause an unreasonable restraint on competition.⁹⁶ In essence, the opinion treats such a conspiracy as a per se violation of the section.

While at least one other circuit followed the *Pick-Barth* doctrine,⁹⁷ commentators reacted critically, pointing to several flaws in the doctrine.⁹⁸ To begin with, the doctrine attacks what is often

90. *Id.* at 101.

91. *Id.*

92. *Id.*

93. *Id.* at 99.

94. *Id.*

95. *Id.* at 103.

96. *Id.* at 102.

97. The First Circuit followed *Pick-Barth* in *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960), and the Tenth Circuit followed it in *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966). In *Allied Heel*, the Atlantic Heel Company complained of unfair practices by the defendants that included enticing away its key employees and sales representatives, misappropriating its trade secrets, disparaging its products, instituting bad faith litigation against it, interfering with its supply of raw materials, and the defendants' passing themselves off as affiliated with it. 284 F.2d at 879-80. The First Circuit reaffirmed *Pick-Barth* and held that this conduct constituted a per se violation of section 1. *Id.* at 884. In *Perryton Wholesale*, the defendant solicited away a number of the plaintiff's employees. 353 F.2d at 620-21. The employees then encouraged the plaintiff's customers to switch to the defendant (often before the employees officially terminated their employment with the plaintiff). *Id.* According to the Tenth Circuit, this conduct was a per se violation of section 1. *Id.* at 622.

A number of district court decisions have also followed *Pick-Barth* to a greater or lesser extent. *See, e.g.*, *Snyder v. Howard Johnson's Motor Lodges, Inc.*, 412 F. Supp. 724, 729 (S.D. Ill. 1976); *Mr. Hanger, Inc. v. Rizzuto*, 410 F. Supp. 1158, 1160 (S.D.N.Y. 1975); *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F. Supp. 277, 283 (E.D. Wis. 1975); *Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co.*, 392 F. Supp. 1098, 1107 (S.D. Tex. 1975); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501, 513 (E.D. Pa. 1973); *Vogue Instrument Corp. v. Lem Instruments Corp.*, 40 F.R.D. 497, 500 & n.4 (S.D.N.Y. 1966).

98. *See, e.g.*, Boone, *Single-Corporation Competitive Torts and the Sherman Act: A Projection Based upon a Review of the Albert Pick, Atlantic Heel, and Perryton Cases*, 2 GA. L. REV. 372 (1968); Yoerg, *Should a Trade Secrets Misappropriation Claim Lie in the Procrustean Antitrust Bed?*, 22 ANTITRUST BULL. 1 (1977); Comment, *A Reexamination of Pick-Barth Per Se Illegality Under Section 1 of the Sherman Antitrust Act*, 38 U. PITT. L. REV. 87 (1976);

essentially the conduct of a single firm,⁹⁹ bringing it within the ambit of section 1 by finding either a contrived or fortuitous conspiracy.¹⁰⁰ It seems strange to recognize a per se violation of the Sherman Act when the defendant happens to receive outside aid in performing unfair trade practices, but to require proof of a sufficient impact on the market to violate section 2 if the defendant committed the same act alone. More significantly, the *Pick-Barth* doctrine confuses injury to competitors with injury to competition.¹⁰¹ In fact, many of the tactics condemned as unfair have at least the short-term effect of increasing competition.¹⁰² Misappropriating trade secrets, for instance, decreases the victimized firm's ability to charge monopoly prices.¹⁰³ Similarly, enticing away employees may have a near-term procompetitive effect.¹⁰⁴ Any anticompetitive effect would occur only if such tactics drive enough competing firms out of the market to result in a significantly increased concentration. The need to assess the impact of such changes in market structure and to weigh that impact against any procompetitive effect argues strongly against a per se approach.¹⁰⁵

Stung by the reaction of the commentators, the First Circuit backed away from *Pick-Barth* in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*¹⁰⁶ Whitten and Paddock manufactured recirculation systems for public swimming pools.¹⁰⁷ Whitten sued Paddock and its affiliated companies for allegedly violating sections 1 and 2 of the Sherman Act.¹⁰⁸ According to Whitten, Paddock had engaged in a series of "dirty tricks" that included improperly persuad-

Note, *Antitrust—Sherman Act and Competitive Business Torts—Acts of Unfair Competition with Intent to Injure Competitor Held a Per Se Violation*, 42 *FORDHAM L. REV.* 909 (1974) [hereinafter Note, *Sherman Act*]; Note, *Unfair Competition Under the Sherman Act: C. Albert Sauter Co. v. Richard S. Sauter Co. and the Pick-Barth Rule*, 59 *IOWA L. REV.* 1194 (1974) [hereinafter Note, *Unfair Competition*]; Note, *Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act*, 58 *TEX. L. REV.* 415 (1980) [hereinafter Note, *Antitrust Treatment*].

99. For example, a single entity can misappropriate trade secrets. See, e.g., *Smith v. Dravo Corp.*, 203 F.2d 369 (7th Cir. 1953). In addition, it can disparage its competitor's goods. See, e.g., *Allan Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N.Y.S. 692 (1928).

100. See Boone, *supra* note 98, at 380; Yoerg, *supra* note 98, at 36-38.

101. See Note, *Antitrust Treatment*, *supra* note 98, at 431.

102. See Yoerg, *supra* note 98, at 33-34; Comment, *supra* note 98, at 111; Note, *Antitrust Treatment*, *supra* note 98, at 427.

103. See, e.g., Note, *Unfair Competition*, *supra* note 98, at 1217; Note, *Antitrust Treatment*, *supra* note 98, at 427.

104. See, e.g., Yoerg, *supra* note 98, at 33-34; Note, *Unfair Competition*, *supra* note 98, at 1217 n.227.

105. See Boone, *supra* note 98, at 382, 390.

106. 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

107. *Id.* at 549.

108. *Id.* at 549-50.

ing the drafters of a university construction fund report to give conclusions unfavorable to Whitten, attempting to make gifts to influence a public works employee,¹⁰⁹ sneaking an advance look at a Whitten bid, and attempting to induce a distributor of contracts information to cease providing Whitten with data tailored to its needs.¹¹⁰ Despite these practices, the district court granted judgment for the defendants,¹¹¹ and the First Circuit affirmed.¹¹² The court of appeals held that, although such unfair tactics could violate section 1 under some circumstances, they are not illegal per se.¹¹³ When confronting the *Pick-Barth* line of cases, the court distinguished them on their facts and rejected their approach.¹¹⁴ Having refused to apply a per se rule, the court of appeals upheld the district court's findings that the effect of Paddock's unfair practices was insufficient to constitute a violation under the rule of reason standard.¹¹⁵

Disowned by its own circuit, every other circuit that has considered the *Pick-Barth* doctrine since *Whitten* has rejected it.¹¹⁶ This raises a new question, however. When do unfair practices become illegal under a rule of reason analysis? The Fifth Circuit answered this question in *Northwest Power Products, Inc. v. Omark Industries*.¹¹⁷ Northwest was a distributor in the Dallas area of power fasteners used in construction.¹¹⁸ Omark, a manufacturer of these tools,

109. This case, therefore, involved an unsuccessful offer of a classic commercial bribe. Such an abortive effort, however, achieves neither a conspiracy nor a restraint of trade and cannot constitute a violation of section 1.

110. *Whitten*, 508 F.2d at 555-56.

111. *Id.* at 550.

112. *Id.* at 562.

113. *Id.* at 560.

114. The court stated that the practices in *Pick-Barth*, *Atlantic Heel*, and *Perryton* involved efforts to destroy the respective plaintiffs as viable competitors rather than mere attempts to gain a larger market share through unfair means. *Whitten*, 508 F.2d at 561-62. A comparison of the practices in the cases, however, suggests the spuriousness of this distinction. Enticing away key employees and stealing customer lists—the principal activities in *Pick-Barth*—are fundamentally efforts to win in the marketplace. On the other hand, Paddock's effort to cut off Whitten's access to contract data seems to have been designed as an attack against Whitten as a competitor. Indeed, the court itself does not appear convinced by this distinction. *See id.* at 562.

115. *See id.* Whitten had actually increased its sales volume. *Id.*

116. *See* A.H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1305 & n.5 (9th Cir. 1981); Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 555-56 (7th Cir. 1980); Franklin Music Co. v. American Broadcasting Cos., 616 F.2d 528, 541-42 & n.18 (3d Cir. 1979); Stifel, Nicolaus & Co., Inc. v. Dain, Kalman & Quail, Inc., 578 F.2d 1256, 1261 (8th Cir. 1978); Northwest Power Prods., Inc. v. Omark Indus., 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); El Cid, Ltd. v. New Jersey Zinc Co., 551 F. Supp. 626, 632 (S.D.N.Y. 1982); Merkle Press, Inc. v. Merkle, 519 F. Supp. 50, 53, 54 (D. Md. 1981).

117. 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

118. *Id.* at 85.

grew dissatisfied with Northwest.¹¹⁹ It secretly persuaded Northwest's sales manager to join another firm, Bosco Fastening Service Center, which then began to distribute Omark's product.¹²⁰ Bosco hired other Northwest employees, including one "who took with her a valuable customer list."¹²¹ Bosco and Omark thereupon launched a campaign to make false and disparaging remarks about Northwest to Northwest's customers.¹²² Northwest sued Omark and Bosco alleging a violation of section 1, but the district court granted summary judgment for the defendants.¹²³ The Fifth Circuit affirmed, declining to follow *Pick-Barth*.¹²⁴ Instead, it held that unfair practices violate section 1 only if they provide the defendant some degree of monopoly power.¹²⁵ The court borrowed from the law of mergers to establish a standard for gauging when the defendant achieved impermissible power.¹²⁶ If a merger between the plaintiff and defendant would violate section 1 by creating too great a concentration in the market, then the section would also prohibit the defendant from engaging in unfair trade practices that harm the plaintiff enough to cause the same concentration.¹²⁷ Because the defendants' activities in *Northwest Power Products* left the market less concentrated than it was before, no violation resulted.¹²⁸

This is where the law stood when the Fifth Circuit, in *Associated Radio Service Co. v. Page Airways, Inc.*,¹²⁹ confronted a case of unfair practices that included classic commercial bribery. The court in *Associated Radio* simply treated classic commercial bribery as another unfair practice and applied the test established in *Northwest Power Products*.¹³⁰ The court noted that Page had been a potential entrant into a highly concentrated market¹³¹ and held that Page would have violated the antitrust laws if it attempted to acquire Associated by

119. *Id.* at 85-86.

120. *Id.* at 86.

121. *Id.*

122. *Id.*

123. *Id.* at 85.

124. *Id.*

125. *Id.* at 89.

126. *Id.* at 89-90.

127. *Id.*

128. *Id.*

129. 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

130. *See id.* at 1351-53. The court embellished the test somewhat by breaking it into two parts: "(1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." *Id.* at 1351.

131. *Id.* at 1352. At the time of Page's acts, a total of five companies competed in the relevant avionics market, with Associated holding a fifty percent share of that market. *Id.*

merger.¹³² Because Page obtained at least the same market share previously enjoyed by Associated, while at the same time raising its prices and profits, the court was satisfied that Page gained substantial power through its unfair conduct.¹³³

Under the reasoning of *Associated Radio*, classic commercial bribery can violate section 1 if a briber successfully uses it to drive out competitors and thereby achieve a significant increase in market concentration.¹³⁴ Although the *Associated Radio* approach is an improvement on the "square peg" line of cases, it is also unnecessarily restrictive. It ignores critical differences between classic commercial bribery and other unfair trade practices. First, unlike such practices as misappropriating trade secrets or disparagement, commercial bribery, by its very nature, requires the involvement of more than one entity. A bribe does not occur without an agreement between the briber and the recipient. More importantly, classic commercial bribery lacks the short-term procompetitive effects of other unfair trade practices. In fact, and this is the fundamental point that *Associated Radio* missed, classic commercial bribery destroys competition and leads to monopoly pricing irrespective of its effect on competitors, and thus on market structure.¹³⁵ *Associated Radio* illustrates this point. As proof of Page's monopoly power, the court pointed to its increased prices and profits.¹³⁶ Page's profits were particularly high on foreign contracts in instances when there was also evidence of bribery.¹³⁷ In suggesting that the aggregate of Page's unfair practices gave it a market share sufficient to exact this income,¹³⁸ the court missed a seemingly obvious point. The bribes, not market share, allowed Page to charge prices and realize profits above competitive levels.

132. See *id.* at 1352-53 (citing *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967)).

133. *Id.* The court focused specifically upon the impact of Page's bribes in noting that two or three of the avionics contracts that Page obtained through this tactic could keep a competitor in business for a year. *Id.* at 1353, 1355.

134. Such an extensive market impact may not be that rare. Bribery seems particularly likely to be found in concentrated industries in which the entrants are competing for a few critical contracts (e.g., aircraft and defense). See T. GLADWIN & I. WALTER, *MULTI-NATIONALS UNDER FIRE* 313-14 (1980); Note, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 *STAN. L. REV.* 561, 564 (1980).

135. For further discussion of the anticompetitive effect of classic commercial bribery, see *infra* notes 186-94 and accompanying text.

136. See *Associated Radio*, 624 F.2d at 1352 & n.19. On each airplane that Page outfitted, Page increased its prices an average of more than twenty percent above the prices Associated had charged before Page's entry. *Id.* at 1352 n.19. This allowed Page to obtain twice the profits that Associated had realized. *Id.* at 1353 n.19.

137. *Id.* at 1348, 1353 n.19. Page increased prices on contracts with foreign governments even more than on domestic contracts and tripled the profits that Associated had earned on foreign contracts. *Id.*

138. See *id.* at 1353.

3. THE RECIPROCAL DEALING AND TIE-IN ANALOGY

In *City of Atlanta v. Ashland-Warren, Inc.*,¹³⁹ the United States District Court for the Northern District of Georgia suggested yet a third way of approaching commercial bribery under section 1 of the Sherman Act. This decision arose out of an antitrust suit brought by the city of Atlanta.¹⁴⁰ One of the defendants, Western Contracting, asserted a counterclaim against the city and a crossclaim against another firm, F.O. Thacker Contracting, for allegedly bribing Atlanta officials in violation of section 1.¹⁴¹ Because of the bribe, city officials insisted that Western award a subcontract to Thacker for concrete work on a number of paving projects involved in building a new terminal at the city's airport.¹⁴² When Western refused (preferring to do the concrete work itself), the officials awarded the construction contract to a higher bidder that subsequently granted a subcontract to Thacker.¹⁴³ In denying motions to dismiss Western Contracting's counterclaim and crossclaim,¹⁴⁴ the district court distinguished *Calnetics Corp. v. Volkswagen of America, Inc.*,¹⁴⁵ *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*,¹⁴⁶ and *Parmelee Transportation Co. v. Kee-shin*,¹⁴⁷ which held that "allegations of commercial bribery, standing alone, will not support a claim for relief" under section 1.¹⁴⁸ The court held that these cases were not controlling because Western alleged more than mere bribery.¹⁴⁹ Specifically, Western alleged that Thacker and the city had engaged in a combination or conspiracy to supplant competition for the concrete work.¹⁵⁰ The court's effort to distinguish these cases is specious, however, because any claim of classic commercial bribery necessarily implies the existence of a combination or conspiracy between the briber and the bribed agent to supplant competition.¹⁵¹ Of more immediate interest, the court also suggested

139. 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1982).

140. *See id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* The court should have dismissed Western Contracting's claim against Atlanta because the city was a victim of, rather than a party to, the commercial bribery.

145. 532 F.2d 674 (9th Cir.), *cert. denied*, 529 U.S. 940 (1976).

146. 235 F. Supp. 393 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

147. 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

148. *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1982). For further discussion of *Calnetics*, *Sterling Nelson & Sons*, and *Parmelee*, see *supra* Section IIB.

149. *Id.*

150. *Id.*

151. *See supra* Section IIA.

that the restraint created by the bribe might be "somewhat akin" to that resulting from tying arrangements or reciprocal dealing.¹⁵²

Tying refers to the practice of conditioning the sale of one product upon the purchase of a second, or tied, product.¹⁵³ Such an arrangement would exist, for example, if a manufacturer of tabulating machines required anyone desiring to buy its equipment to purchase its punch cards as well.¹⁵⁴ The Supreme Court has long held certain tie-ins to constitute a per se violation of section 1.¹⁵⁵ Not all package sales are illegal, however. To violate the Sherman Act, there must be two distinct products, the seller must possess sufficient economic power in the tying product's market to cause purchaser acceptance of the tied product, and the tie must foreclose a substantial volume of commerce to other sellers.¹⁵⁶ Unsurprisingly, each of these three requirements involves considerable economic analysis despite the per se label.

Reciprocal dealing occurs when one party agrees to make purchases from the other on the condition that the other will make purchases from it.¹⁵⁷ For instance, a grocery store chain, which owns a subsidiary that produces dehydrated onion and garlic, would be engaging in reciprocity if it bought from food processors only on condition that they buy onion and garlic from its subsidiary.¹⁵⁸ The jurisprudence governing reciprocity under section 1 of the Sherman Act is of much more recent vintage than that respecting tie-ins.¹⁵⁹ Thus, the legal status of reciprocal dealing under this section is much less certain. Nevertheless, several recent lower court decisions suggest that certain forms of reciprocal dealing, like tie-ins, are per se violations of section 1.¹⁶⁰ Reciprocity can range from a mere unilateral hope that

152. See *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1982). The analogy between commercial bribery and reciprocal dealing appears to have been first suggested by Jacob H. Zamansky. See Zamansky, *supra* note 20, at 569-71.

153. See, e.g., *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984).

154. See *International Business Mach. Corp. v. United States*, 298 U.S. 131, 133-34 (1936).

155. See, e.g., *Jefferson Parish Hosp.*, 466 U.S. at 13-14.

156. See *id.* at 12-18; *Northern Pac. Ry. v. United States*, 356 U.S. 1, 11 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610-14 (1953).

157. See, e.g., Zamansky, *supra* note 20, at 569 n.137.

158. See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 595-97 (1965).

159. For some years, the Federal Trade Commission has attacked reciprocal dealing under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982), and under section 7 of the Clayton Act, 15 U.S.C. § 18 (1982). See, e.g., *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *In re California Packing Corp.*, 25 F.T.C. 379 (1937); *In re Mechanical Mfg. Co.*, 16 F.T.C. 67 (1932). The case of *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966), appears to be the first to apply section 1 against reciprocal dealing, although, like *Consolidated Foods*, it arose in the context of a challenged merger.

160. See, e.g., *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), *cert. denied*, 444 U.S. 381 (1979); *Columbia*

patronizing a firm will influence it to order one's own product, to a mutually desired agreement for cross purchases, all the way to a coercive insistence by a firm with market power over patronage. While the first practice is clearly legal,¹⁶¹ and the status of the second is subject to much uncertainty and debate,¹⁶² a number of courts have held that coercive reciprocal dealing should receive the same analysis that applies to tie-ins.¹⁶³

At first glance, the analogy between tie-ins, reciprocal dealing, and classic commercial bribery seems persuasive. In each case, the practice undermines competition based purely on the merits of price and quality by introducing an "alien factor" into the buyer's decision-making.¹⁶⁴ Ultimately, however, the parallel is not complete and the analogy produces a misleading analysis. Tie-ins and reciprocal dealing are illegal when they involve the use of monopoly power in one market to leverage an advantage in another.¹⁶⁵ This means that before declaring such practices per se illegal, the court must evaluate the defendant's market power. Further, tying and reciprocity are not devoid of any offsetting procompetitive benefits.¹⁶⁶ It is therefore reasonable for courts to prohibit these practices only when they foreclose a substantial volume of commerce. Classic commercial bribery is dif-

Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971); Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Eng'g Co., 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977); Ryals v. National Car Rental Sys., 404 F. Supp. 481 (D. Minn. 1975).

161. See *United States v. Empire Gas Corp.*, 393 F. Supp. 903, 908-09 (W.D. Mo. 1975) (holding that unilateral action does not violate section 1), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 66 (S.D.N.Y. 1966) (A unilateral hope for reciprocity does not even fulfill the combination or conspiracy requirement for a section 1 violation.).

162. See *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 14 (4th Cir. 1971); see also *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977) (finding that a party to noncoercive dealing may not recover from the other for the violation). Compare *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 66 (S.D.N.Y. 1966) (Mutual reciprocity, like tie-ins, should be treated as a per se violation.) and Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873, 882 (1964) (A per se prohibition is appropriate for reciprocal dealing agreements.) with Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROBS. 552, 573-74 (1965) (Reciprocal dealing does not "appear to offer any targets for the guns of antitrust.").

163. See, e.g., *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1220 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 424-25 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979).

164. See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965).

165. There is some authority that reciprocal dealing may be illegal even if it does not involve such leverage. See cases cited *supra* note 162. The uncertainty surrounding this issue, however, renders it a poor foundation upon which to base an analogy.

166. See, e.g., Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 21 (1957); Lorie & Halpern, *Conglomerates: The Rhetoric and the Evidence*, 13 J. L. & ECON. 149, 151-52 (1970).

ferent on both counts. It destroys competition on the merits irrespective of a defendant's market power and has no countervailing procompetitive utility.¹⁶⁷ In light of these differences, the viability of a cause of action for commercial bribery under section 1 should not depend on the claimant's ability to show monopoly power or substantial foreclosure of commerce in a given market.

4. BACK TO THE BASICS: A FRESH LOOK AT WHETHER COMMERCIAL BRIBERY VIOLATES THE SHERMAN ACT

Instead of searching for a convenient cubbyhole, the best approach is to evaluate whether commercial bribery, on its own merits, constitutes a violation of section 1 of the Sherman Act. In *Bunker Ramo Corp. v. United Business Forms, Inc.*,¹⁶⁸ the Seventh Circuit indicated a willingness to do just that. *Bunker Ramo* did not involve classic commercial bribery; rather, United Business bribed a Bunker Ramo employee as part of a fraudulent invoice scheme.¹⁶⁹ Under the scheme, the employee ordered forms from United Business in excess of Bunker Ramo's needs.¹⁷⁰ United Business did not deliver the excess forms, but the employee signed false delivery receipts indicating it had.¹⁷¹ United Business then billed Bunker Ramo for quantities never delivered.¹⁷² After discovering the fraud, Bunker Ramo tried everything to recover treble damages. First, it sued for violation of section 2(c) of the Robinson-Patman Act.¹⁷³ The district court, however, determined that Bunker Ramo lacked standing and thus the court dismissed the complaint.¹⁷⁴ Bunker Ramo then filed a second complaint alleging violations of both section 1 of the Sherman Act and the RICO Act.¹⁷⁵ The district court denied United Business' motion to dismiss the complaint for failure to state a cause of action.¹⁷⁶

On interlocutory appeal, the Second Circuit reversed the district court, holding that Bunker Ramo failed to state a claim under section

167. See *infra* notes 186-94 and accompanying text.

168. 713 F.2d 1272 (7th Cir. 1983).

169. *Id.* at 1275.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Bunker Ramo Corp. v. Cywan*, 511 F. Supp. 531, 532 (N.D. Ill. 1981).

174. *Id.* at 534. The court held that because Bunker Ramo and United Business were not competitors, Bunker Ramo had no standing to assert a claim against United Business under section 2(c) of the Robinson-Patman Act. See *id.* at 533-34. For a discussion of the standing requirement of section 2(c), see *supra* text accompanying note 19.

175. *Bunker Ramo*, 713 F.2d at 1275-76.

176. *Id.* at 1276.

1.¹⁷⁷ In doing so, however, the court did not reject the claim outright as falling outside the traditional categories of violations. Rather, the court analyzed the competitive impact of the alleged conduct to determine if it was the type of conduct that the antitrust laws were intended to prevent.¹⁷⁸ First, it considered whether the conduct could be a per se violation of the section. Bunker Ramo argued that United Business' conduct amounted to price fixing that forced Bunker Ramo to pay an artificially high, noncompetitive price.¹⁷⁹ As discussed below, this is the precise effect of classic commercial bribery.¹⁸⁰ Unfortunately for Bunker Ramo, it did not allege that it was the victim of classic commercial bribery. Instead, it simply claimed that, as a result of bribery, it paid for forms it never received.¹⁸¹ As the court pointed out, this is "more akin" to a scheme to defraud than a price fixing scheme.¹⁸² The court then concluded that because the challenged practice did not have a sufficiently evident anticompetitive impact and because the courts have had little experience in dealing with such conduct under the antitrust laws, the conduct did not merit per se treatment.¹⁸³ The court next analyzed Bunker Ramo's claim under the rule of reason.¹⁸⁴ Finding no allegation of any anticompetitive effect from United Business' conduct, the court concluded that Bunker Ramo failed to state a cause of action under section 1 of the Sherman Act.¹⁸⁵

The *Bunker Ramo* court showed a refreshing willingness to consider the competitive impact of commercial bribery. It also reached the correct result upon the facts before it, as the scheme amounted to little more than simple theft and lacked any impact on competition. The same cannot be said about classic commercial bribery.¹⁸⁶

177. *Id.* at 1285. The court of appeals upheld the lower court's holding that Bunker Ramo's second suit was not barred by the doctrine of res judicata. *Id.* at 1279. The court of appeals held that because the trial court dismissed the first suit for lack of subject matter jurisdiction, any consideration of the merits by that court had no res judicata effect. *Id.*

178. *See id.* at 1283; *see also supra* notes 44-55 and accompanying text (discussing the framework that courts use in analyzing claims alleging Sherman Act violations).

179. *See Bunker Ramo*, 713 F.2d at 1284.

180. *See infra* notes 186-94 and accompanying text.

181. *See Bunker Ramo*, 713 F.2d at 1284.

182. *Id.*

183. *Id.* at 1284-85.

184. *See id.* at 1285.

185. *Id.*

186. The Third Circuit recently confronted a claim under section 1 involving commercial bribery in *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367 (3d Cir. 1985). As in *Bunker Ramo*, the court analyzed the claim under a basic section 1 approach, although with more questionable results. Also, like *Bunker Ramo*, the payoffs did not constitute classic commercial bribery. Seaboard competed with Manufacturers Reps Company in the wholesale distribution of roofing felt made by Congoleum. *Id.* at 368-69. At the instigation of

To understand the competitive impact of classic commercial bribery, one must consider why firms engage in the practice. An inefficient firm may pay off a purchasing agent or government official because it cannot obtain the business based upon the price or quality of its product. Even if the firm is efficient and could therefore compete on the basis of price or quality, it may still engage in bribery due to one of two motivations. It may be a defensive effort to respond to the extortion of the agent or to respond to bribery by other firms. Alternatively, the firm may give the payoff in lieu of lowering prices or increasing quality in order to reap monopoly profits.¹⁸⁷ In each

Congoleum's sales manager, Manufacturers began paying him various "consulting fees." *Id.* at 369. In exchange, he arranged for Manufacturers to get favorable treatment from Congoleum, including an agreement to sell felt on commission rather than by taking title and reselling. *Id.* Once the relationship between Congoleum's sales manager and Manufacturers was established, "Seaboard's longstanding relationship with Congoleum deteriorated." *Id.* As a result, Seaboard sued the sales manager, Congoleum, and Manufacturers alleging violations of both section 1 of the Sherman Act and the Robinson-Patman Act. The district court granted the defendants' motion for summary judgment, and the court of appeals affirmed. *Id.* at 375.

Seaboard argued that the scheme amounted to a group boycott that violated the Sherman Act under either a per se or rule of reason approach. *Id.* at 373. The court, however, treated Congoleum's favoritism of Manufacturers as a unilateral action by Congoleum to restructure its distribution arrangements, and thus found that it did not constitute an illegal group boycott. *Id.* at 374; see *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) ("There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."). Turning to a rule of reason analysis, the Third Circuit upheld the district court's findings that Congoleum increased intrabrand competition by making Manufacturers a commission agent because this action allowed Congoleum to lower prices and compete more effectively with other producers. *Seaboard*, 770 F.2d at 375.

The court's analysis is problematic because it ignores the bribery. In large part, Seaboard invited this omission by naming Congoleum as a defendant and attacking Congoleum's dealing with Manufacturers. As a producer, Congoleum is entitled to optimize the sale of its products by choosing to favor one distributor over another. It is also entitled, however, to choose between distribution arrangements and companies to carry out those arrangements unrestrained by agreements that lack any redeeming virtue. Such agreements include a conspiracy among distributors or a conspiracy to bribe between a distributor and an employee of the producer. Here, the conspiracy between Manufacturers and Congoleum's sales manager destroyed Seaboard's opportunity to compete for Congoleum's business and Congoleum's ability to reap the advantages of such competition. The court's suggestion that the challenged conduct did not produce any anticompetitive effect was therefore incorrect. Congoleum, incidentally, fired the sales manager upon its discovery of his dealings.

Congoleum possibly may have favored Manufacturers even without the bribe. In that event, Seaboard's claim fails for want of causation. The failure of both the court and Seaboard to focus upon the true conspiracy meant the case never addressed this issue. For another example of this myopic approach, see *Gregoris Motors v. Nissan Motor Corp. in USA*, 630 F. Supp. 902 (E.D.N.Y. 1986) (auto dealer alleging that competing dealers bribed Nissan employers in order to receive larger allotments of automobiles failed to allege anticompetitive effect and therefore did not state a claim under section 1).

187. In one fairly common situation, a firm may resort to bribery despite its original intention of competing on the basis of price and quality. The situation arises in secret bidding,

case, classic commercial bribery has the effect of raising prices above competitive levels. When made by an inefficient firm or an efficient firm that intends to reap monopoly prices, the bribe's very purpose is to avoid competition and thereby maintain higher prices (or poorer quality).¹⁸⁸ Even when used defensively, the bribe's impact is to increase costs as various bidders curry favor with the dishonest agent.¹⁸⁹ As the defensive briber's expenses increase and price competition erodes (even though this was not the defensive briber's original intent), the briber has every incentive to pass the cost of the payoff on to the buyer.¹⁹⁰

The anticompetitive effect of classic commercial bribery is in fact remarkably similar to that of price fixing. In price fixing, an agreement between two or more sellers precludes the buyer from obtaining a competitive market price.¹⁹¹ In classic commercial bribery, the

where a bidder pays off a contracting agent to disclose to the bidder the contents of other bids in order to ensure that it is the low bidder. This does not come within the definition of classic commercial bribery. See *supra* text accompanying note 35. Moreover, its competitive effect is unclear. While this practice may permit the briber to bid higher than it otherwise might secure with knowledge of the competing bids, the information could cause the briber to bid lower than it would otherwise have intended had it underestimated its competition.

188. Some writers might argue that situations could arise in which firms bribe in order to increase their market share at prices they and others will maintain with or without bribery. See Note, *supra* note 134, at 565 n.16. In such an event, the bribe determines who gets the sales but not the price. This argument assumes a rigidity in pricing that is extremely improbable in markets in which commercial bribery is most likely to flourish. In highly competitive markets for fungible goods, firms may sell at prices they do not set. Bribery is unlikely to occur in such a market, however, because each entrant can sell all its output at the prevailing price. See *id.* at 564 n.13. (Moreover, bribery to obtain sales in such markets above the known price is easily detected.) At the other extreme, a natural monopolist who sets the optimum price for its goods need not resort to bribery to gain sales. See *id.* Bribes occur between these extremes in oligopolistic markets, particularly those involving large negotiated contracts. See *id.* at 564 & n.13; *supra* note 134. A large negotiated contract, by its very nature, encourages the use of bribery because of the high degree of discretion conferred upon the agent and because of the sheer economic importance of closing the deal. In oligopolistic markets involving such contracts, the briber, by making the payoff, will channel away the forms of price and nonprice competition that benefits the consumer. Indeed, having derailed price competition, the rational briber should raise prices on the contract procured through a corrupt agent until he reaches one of three limits: (1) A price that a monopolist would charge to maximize his profits, if the monopolist were able to price discriminate for this particular customer; (2) a price so striking as to create a risk of detection greater than the added return; or (3) a price that exceeds whatever sense of loyalty a dishonest agent retains toward his principal.

189. See Note, *supra* note 134, at 564-67.

190. The buyer is not completely helpless against commercial bribery. Many, if not most, attempt some monitoring of their agents. This, however, imposes added nonproductive costs upon the buyer. It also can never be foolproof.

191. See *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-24 (1940); *cf.* *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 8-9 (1979) (price fixing "is not a question simply of determining whether two or more potential competitors have literally 'fixed' a price").

agreement is between one seller and the agent for the buyer.¹⁹² Because the bribed agent will not consider the bids of other sellers, this agreement cuts off the buyer's ability to obtain a competitive price just as much as if the other sellers had agreed not to compete. Indeed, classic commercial bribery's anticompetitive effect may even be greater than that of price fixing. In a price fixing conspiracy, there may be sellers who are not parties to the agreement. Also, parties to the combination face the ever-present temptation to cheat.¹⁹³ Thus, buyers may be able to circumvent the conspiracy. Classic commercial bribery, in contrast, does not depend upon the agreement and compliance of multiple sellers. Moreover, classic commercial bribery precludes competition on quality as well as price—something few price-fixing conspiracies can do.¹⁹⁴

This analysis suggests that classic commercial bribery creates an anticompetitive effect that is sufficient, at the very least, to warrant judicial evaluation under a rule of reason analysis. Furthermore, the pernicious nature of its anticompetitive effect may provide a basis for a per se prohibition. Before a court may impose such a prohibition, however, it must overcome three objections.

First, do courts have sufficient experience with classic commercial bribery to predict confidently its anticompetitive effects? As noted above,¹⁹⁵ a per se rule is essentially a statement that the judiciary possesses adequate knowledge of the challenged conduct's economic impact to make the production of evidence on that point (which otherwise would be required under the rule of reason) unnecessary. Courts have had little experience with the competitive impact, if any, of *all* the various forms of commercial bribery.¹⁹⁶ The same is not true, however, if the discussion is confined to classic commercial bribery. As outlined above, the effect of classic commercial bribery is relatively straightforward and uniformly anticompetitive.¹⁹⁷ While courts have had limited experience with classic commercial bribery

192. See *supra* text accompanying note 35.

193. See Posner, *Oligopoly and Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1573 (1969) (“[F]ew price-fixing conspiracies have come to light in which cheating was not rife and the benefits to the conspirators enduring.”).

194. Cf. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982) (finding that a bid-rigging agreement is “[e]ven more egregiously contrary to vital competition among businesses” because it “eliminates not only price competition, but also competition in service and product quality”).

195. See *supra* text accompanying note 54.

196. In *Bunker Ramo*, for example, the court felt uncomfortable with the extent of judicial experience in dealing with the economic effect of the type of bribery scheme that the court encountered in the case. See *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983).

197. See *supra* notes 186-90 and accompanying text.

cases dealing specifically with section 1 of the Sherman Act (and have not undertaken any meaningful analysis of its impact in the cases before them), courts have had much experience with it in other contexts.¹⁹⁸ In none of these contexts have courts found that classic commercial bribery possesses any redeeming procompetitive qualities.¹⁹⁹ Indeed, they occasionally have noted its anticompetitive impact.²⁰⁰ In addition, the Federal Trade Commission—an agency with some expertise on matters of competition—has long condemned commercial bribery.²⁰¹

The second obstacle to a per se prohibition of classic commercial bribery would be the existence of any redeeming procompetitive attributes to the conduct.²⁰² No such defense has ever been offered to support classic commercial bribery. Beyond destroying price and quality competition, about the only impact of such payoffs is the enrichment of dishonest agents.²⁰³

The final obstacle centers around the question of whether classic

198. *See supra* note 3.

199. *See, e.g.*, *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 372 (3d Cir. 1985) (“Unquestionably, commercial bribery is an indefensible practice . . .”).

200. For example, one court of appeals noted the anticompetitive effect of a payoff as follows:

Plainly, the payment of the secret commissions to Fitch . . . resulted in lessening competition in the sale of coal to the Power Company. It would have been practically impossible for any other company to sell coal to appellee, when the president of the Power Company had such an understanding with the Coal Company and such a motive to purchase from it all the coal requirements for his company.

Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12, 16 (6th Cir. 1943).

201. *See supra* note 3. In its early years, the Federal Trade Commission undertook numerous prosecutions for commercial bribery. *See Note, Bribery in Commercial Relationships*, 45 HARV. L. REV. 1248, 1251 (1932). At that time, section 5 of the Federal Trade Commission Act only prohibited unfair methods of competition. *See Federal Trade Commission Act*, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45 (1982)). Congress added the prohibition upon unfair and deceptive acts in 1938. *See Wheeler-Lea Act of 1938*, ch. 49, § 3, 52 Stat. 111, 111 (codified at 15 U.S.C. § 45 (1982)). As used in section 5, “unfair methods of competition” refers primarily to practices that violate the spirit, if not the letter, of the antitrust laws and not simply to conduct that the Commission might view in some broad sense to be “unfair.” *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

202. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 7-8 (1979) (agreements or practices “so often” lacking any redeeming value are per se invalid); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977) (pernicious effect on competition and “lack of any redeeming virtue” lead to a per se prohibition); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (same).

203. Commercial bribery might allow less efficient competitors to obtain contracts and remain in a market. This impact is likely to be short lived, however, once more efficient competitors retaliate with their own bribes. More fundamentally, the maintenance of inefficient companies through anticompetitive agreements is antithetical to the goals of the Sherman Act.

commercial bribery, which may only involve one contract, has a sufficient market impact to merit per se treatment. Before courts will consider conduct to be in restraint of trade, the conduct must be shown to have created a substantial effect in a defined market.²⁰⁴ Furthermore, courts will not impose per se treatment on tying arrangements or coercive reciprocal dealing unless the conduct affects a substantial quantity of trade.²⁰⁵ While commercial bribery often creates such an impact,²⁰⁶ this should not be a prerequisite to its per se illegality. First, classic commercial bribery has no offsetting economic or other social utility to balance its anticompetitive effect.²⁰⁷ On the contrary, it is universally prohibited and often criminal under state and federal law. With absolutely nothing to offset its adverse impact on competition, there seems no reason to require that bribery create a quantitatively significant effect.²⁰⁸

Courts, moreover, have applied a per se analysis to practices that are analogous to classic commercial bribery even though those practices did not have a substantial market effect. Price fixing, for example, is illegal without regard to the quantity of trade restrained.²⁰⁹ Given the close parallel in impact between classic commercial bribery and price fixing, courts should treat both practices the same way. One form of price fixing, bid rigging, is an even more compelling example. Firms commonly use two primary methods to circumvent the competitive bidding process for government or private contracts. One is bid rigging—an agreement by other bidders not to go below one contractor's proposal. The other is classic commercial bribery.

204. See, e.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 562 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975); *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1289-90 (2d Cir.), cert. denied, 419 U.S. 1022 (1974); *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F. Supp. 626, 632 (S.D.N.Y. 1982), aff'd, 770 F.2d 157 (2d Cir.), cert. denied, 106 S. Ct. 573 (1985). But cf. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 110 n.42 (1984) ("Where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.").

205. See *supra* notes 156 & 165 and accompanying text.

206. See *supra* note 134 and accompanying text.

207. This is in contrast to most other restraints on trade, including tie-ins, that on occasion could serve some legitimate purpose. See *supra* note 166 and accompanying text.

208. As the Supreme Court has noted: "*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences *must be balanced* against its procompetitive consequences." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977) (emphasis added); see also *Kane v. Martin Paint Stores, Inc.*, 1975 Trade Cas. (CCH) ¶ 65,176 (S.D.N.Y. 1975) ("Anticompetitive conduct which lacks economic justification is not saved from the ban of the [Sherman] Act because it affects only a small amount of commerce.").

209. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

Bid rigging is a violation of section 1, even if it affects only one contract and regardless of the small size of that contract.²¹⁰ Because commercial bribery accomplishes the same result as bid rigging, it seems only reasonable that courts should subject commercial bribery to the same prohibition.²¹¹

III. ISSUES COLLATERAL TO THE SHERMAN ACT CAUSE OF ACTION

Commercial bribery claims brought under section 1 of the Sherman Act raise two additional questions that are potentially troublesome. First, who has standing to assert such a claim? Second, does the *Noerr-Pennington* doctrine bar section 1 claims predicated on the payoff of a government official? The answers to these questions will bear heavily upon the scope of a cause of action for classic commercial bribery under section 1.

A. *Standing to Assert Commercial Bribery Claims Under the Sherman Act*

Though few would dispute that a competitor who loses business due to a payoff would have standing to sue the parties to the bribe for violating the Sherman Act,²¹² less certainty exists when the plaintiff is

210. See, e.g., *United States v. Bensinger Co.*, 430 F.2d 584, 588 (8th Cir. 1970). If, however, the bid rigging involves only intrastate activities, then it must substantially affect interstate commerce in order to meet the Act's jurisdiction prerequisites. See *id.*

211. One difference between commercial bribery and bid rigging involves the nature of the quid pro quo. In bid rigging, one bidder often defers to another in exchange for the other's agreement to do the same for it on a future contract. Thus, the impact of the conspiracy normally extends beyond one contract. Nevertheless, such impact is not a necessary element to the per se illegality of bid rigging. In any event, although commercial bribery may involve one payoff to an agent in exchange for a single contract, the practice is more likely to breed future payoffs. For example, the briber and the corrupt agent commonly agree to a continuing arrangement covering all contracts under the agent's control that involve the briber's product or service. See, e.g., *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 688 (9th Cir.) (per curiam) (illegal commission agreement involving sales for an entire year), *cert. denied*, 429 U.S. 940 (1970); *W.T. Grant & Co. v. Christensen*, 1975 Trade Cas. (CCH) ¶ 60,324 (S.D.N.Y. 1975) (bribery used in scheme to commit store to a number of unfavorable lease arrangements); *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393, 395 (D. Idaho 1964) (bribes made to defendant for over six years), *aff'd*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). Also, a company successfully bribing one agent often follows the practice by bribing others. See, e.g., *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1347 (5th Cir. 1980) (defendant obtained a number of contracts through bribery), *cert. denied*, 450 U.S. 1030 (1981). Further, other companies may be led to engage in the practice in order to compete. See Note, *supra* note 134, at 564-67.

212. See, e.g., *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1362-63 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *W.T. Grant Co. v. Christensen*, 1975 Trade Cas. (CCH) ¶ 60,324 (S.D.N.Y. 1975). Of course, competitors have the difficult burden of proving that they would have received the contract had there been no bribe.

the principal of the agent who received a bribe. In *W.T. Grant Co. v. Christensen*,²¹³ the United States District Court for the Southern District of New York found that a bribed agent's principal had no standing. Grant alleged that the defendants bribed several of its officers.²¹⁴ In exchange for the bribes, the officers agreed to place a number of Grant's stores in the defendants' shopping centers under leases with unreasonably high rents, unfavorable terms, and at poor locations.²¹⁵ Grant sued alleging violations of section 1 of the Sherman Act and various state laws.²¹⁶ The district court dismissed the complaint, holding that Grant was outside the "target area" of the alleged antitrust conspiracy and thus lacked standing under section 4 of the Clayton Act.²¹⁷ In contrast, the court noted that other lessors, as direct competitors of the defendant, might have had standing to sue.²¹⁸

The broad language of section 4 of the Clayton Act would seem to provide a cause of action for anyone injured in his business or property as a result of a violation of the antitrust laws. Courts, however, have developed limitations that reduce the impact of this broad provision. One test, which the court in *W.T. Grant* attempted to apply, is the requirement that the plaintiff be in the "target area" of the alleged antitrust violation.²¹⁹ This means that the plaintiff must be an intended or foreseeable victim of the defendant's activities.²²⁰ On its face it is difficult to understand the court's conclusion that a principal such as Grant is not within the target area of the alleged classic commercial bribery. By engaging in bribery, the briber intended to deprive the principal of the lowest price or best quality.

In any event, the target area approach to standing appears obsolete in light of the Supreme Court's decision in *Associated General Contractors v. California State Council of Carpenters*.²²¹ The Court in

213. 1975 Trade Cas. (CCH) ¶ 60,324 (S.D.N.Y. 1975).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* Section 4 of the Clayton Act provides in part as follows: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1982).

218. *W.T. Grant & Co. v. Christensen*, 1975 Trade Cas. (CCH) ¶ 60,324 (S.D.N.Y. 1975).

219. *See, e.g., Calderone Enters. Corp. v. United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *SCM Corp. v. RCA*, 407 F.2d 166, 171 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

220. *See, e.g., Calderone Enters. Corp.*, 454 F.2d at 1295 ("person against whom the conspiracy was aimed" has standing); *Hoopes v. Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967) (the target area is "the area which it could reasonably be foreseen would be affected").

221. 459 U.S. 519 (1983). For a general discussion of antitrust standing, see Comment, *A*

that case adopted a multifactor test to determine whether a Clayton Act plaintiff has standing. The factors the Court examined include: (1) The existence of a causal connection between the violation and the plaintiff's harm; (2) whether the defendant intended to cause this harm; (3) whether the plaintiff's injury was of a type Congress sought to address in providing a private remedy for violation of the antitrust laws; (4) whether the defendant's conduct directly or indirectly caused the injury; (5) the existence of another class of potential plaintiffs more directly injured who can sue to vindicate the public interest; (6) the speculative nature of the damages; and (7) the possibility of duplicative recovery.²²² Under these factors, it is clear that the principal of the bribed agent would have standing. The existence of harm to the principal in the form of higher prices, poorer quality, or both, and the briber's intent to cause this harm have already been noted. That this is the type of harm Congress was concerned with in providing a private remedy follows directly from the previous discussion of why classic commercial bribery should be considered a per se violation of the Sherman Act.²²³ A comparison with price fixing is again instructive. The principal of a bribed agent is in a very similar position as the consumer whose suppliers engage in price fixing. Such consumers have standing to sue the price fixers.²²⁴ Further, the injury to the bribed agent's principal is caused directly by the bribe rather than being derivative of an injury inflicted on another.²²⁵ While the briber's competitors constitute another class of prospective plaintiffs, their injury is no more direct than that of the principal. Indeed, because the competitors' damages are more speculative,²²⁶ they are less likely to sue. Finally, even if competitors sue, their recovery of lost profits would not duplicate the principal's recovery for higher prices paid or lower quality received.

B. *The Impact of the Noerr-Pennington Doctrine*

Discussion of payoffs to government officials often brings to mind the *Noerr-Pennington* doctrine. Under this doctrine, which flows

Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions, 72 CALIF. L. REV. 437 (1984).

222. *Associated Gen. Contractors*, 459 U.S. at 537-46.

223. See *supra* notes 195-208 and accompanying text.

224. E.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979); see also *Associated Gen. Contractors*, 459 U.S. at 529-30 n.19 (actions may be maintained by consumers).

225. Cf. *Kreager v. General Elec. Co.*, 497 F.2d 468 (2d Cir.) (shareholder suing for harm to their corporation), *cert. denied*, 419 U.S. 861 (1974); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970) (franchisor suing for harm to its franchisee), *cert. denied*, 401 U.S. 923 (1971).

226. See *supra* note 212.

from two Supreme Court decisions,²²⁷ solicitation of government action, even if intended to restrain or eliminate competition, is normally not a violation of the Sherman Act.²²⁸ The following brief analysis demonstrates that the rule is inapposite to classic commercial bribery involving government officials.

The dual bases for the *Noerr-Pennington* doctrine are to preserve a free flow of information to representatives in a democracy and to avoid chilling first amendment rights.²²⁹ Neither of these goals is in any way advanced by allowing persons to bribe public officials to obtain government contracts. First, the doctrine has little, if any, application to solicitation of commercial action by government. For example, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,²³⁰ the Supreme Court found *Noerr* to be inapplicable because the defendants in that case "were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."²³¹ Since *Continental Ore*, lower courts have been divided over whether the *Noerr-Pennington* doctrine has an exception for commercial activities.²³² Even those courts refusing to recognize a

227. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

228. See *Pennington*, 381 U.S. at 670; *Noerr*, 365 U.S. at 136.

229. E.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Noerr*, 365 U.S. at 137-38.

230. 370 U.S. 690 (1962).

231. *Id.* at 707. In *Continental Oil*, the Canadian government appointed one of the defendant companies to purchase and allocate all vanadium needed by the country's industries during World War II. *Id.* at 695. The plaintiff charged that this company refused to purchase vanadium from it as part of a conspiracy to eliminate the plaintiff from the market. *Id.*

Some commentators have argued that the Supreme Court's decision in *Pennington* refutes the recognition of any commercial exception. See Rill & Frank, *supra* note 8, at 152. In *Pennington*, the defendants solicited the Secretary of Labor to establish a minimum wage for companies selling coal to the Tennessee Valley Authority (TVA). 381 U.S. at 660. They also lobbied the TVA to curtail spot market purchases, which were exempt from the minimum wage requirement. *Id.* at 660-61. Hence, *Pennington* involved government procurement. It oversimplifies the case, however, to suggest that the Court was simply looking at a government decision to choose one supplier over another. Rather, the Court recognized that the defendants had lobbied for a policy decision that would promote certain labor practices. See *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

232. Decisions holding or suggesting that the doctrine is inapplicable to commercial acts include: *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1365 (5th Cir. 1983); *Federal Prescription Serv. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 263 & n.10 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Corey v. Look*, 641 F.2d 32, 36 & n.6 (1st Cir. 1981); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 592 n.10 (7th Cir. 1977), *vacated mem.*, 435 U.S. 992, *reinstated per curiam*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 941 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1296-97 (5th Cir.

categorical exception, however, have considered the government's role as a factor in determining whether the defendant's conduct should be considered lobbying and thus permissible.²³³ The courts thus generally agree that when the government engages in an activity that allows it to be the victim of anticompetitive conduct (such as bid rigging or commercial bribery) that is no different in its effects than if the government were a private consumer, there is no reason to afford the government less protection under the antitrust laws than that afforded private consumers. The defendant's anticompetitive activity—classic commercial bribery—therefore falls outside the scope of the rule's protection. Second, it would be anomalous to suggest that courts must permit persons to bribe government officials on the grounds that such activity is necessary to promote informed governmental decisions and to protect first amendment rights, when the bribery of government officials is already prohibited by state and federal law.²³⁴ In the language of the cases, bribery falls within the sham exception to the doctrine.²³⁵

1971), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1981); *General Aircraft Corp. v. Air Am., Inc.*, 482 F. Supp. 3, 7 (D.D.C. 1979); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1384-85 (D. Hawaii 1978).

Contrary decisions include: *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1505 & n.14 (5th Cir. 1985); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983); *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 158 & n.18 (5th Cir. 1971), *cert. dismissed*, 419 U.S. 987 (1974); *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 996 n.9 (S.D.N.Y. 1981); *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 556 n.6 (S.D.N.Y. 1980); *United States v. Johns-Manville Corp.*, 245 F. Supp. 74, 82 (E.D. Pa. 1965).

233. See *Greenwood Utils. Comm'n*, 751 F.2d at 1505 n.14 ("All would agree that . . . if as the result of a price fixing agreement by private parties the government pays more for products it purchases in the marketplace, the participants in the marketplace should not escape liability because of the identity of the victim."); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d at 88 ("[T]he nature of the governmental activity is one factor in determining the type of public input acceptable to the particular decision-making process.").

234. See *supra* note 3.

235. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d at 86-87; *Federal Prescription Serv.*, 663 F.2d at 263; *Dominicus Americano Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 684, 690 n.3 (S.D.N.Y. 1979); *Huron Valley Hosp., Inc. v. City of Pontiac*, 466 F. Supp. 1301, 1313-14 (E.D. Mich. 1979), *vacated on other grounds*, 666 F.2d 1029 (6th Cir. 1981); see also *Sacramento Coca-Cola Bottling Co.*, 440 F.2d at 1099 (*Noerr-Pennington* does not protect efforts to influence government through illegal means including threats and other coercive measures); cf. *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965) (suggesting *Noerr* does not apply if government official is a co-conspirator). But see *Bustop Shelters*, 521 F. Supp. at 996 (approving view that campaign contributions do not bring case within sham exception); *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 704 (D. Colo. 1975) (bribes without anticompetitive impact did not bring case within sham exception); cf. *Metro*

IV. CONCLUSION

It is not difficult to understand the courts' failure to reach a coherent approach regarding commercial bribery claims under the Sherman Act. At first glance, the practice of commercial bribery does not appear to be the stuff of traditional antitrust violations. This leads to the inevitable suspicion that the plaintiff is dressing up what is properly a state law claim in antitrust clothing simply to obtain access to the federal courts and treble damages.²³⁶ Careful analysis reveals, however, that classic commercial bribery is an agreement that has the effect of eroding price and quality competition. Indeed, it is a most pernicious anticompetitive practice because it can deprive government and corporate entities—which only transact business through their agents—of the advantages of free competition. This, in turn, raises costs throughout society. As a result, rather than being foreign to the purposes of the Sherman Act, a *per se* prohibition on classic commercial bribery is long overdue.

Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 230-31 (7th Cir. 1975) ("substantial" campaign contributions come within *Noerr-Pennington*).

236. The fact that state laws also penalize an activity does not preclude Sherman Act coverage. *E.g.*, *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1302-03 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). Indeed, given the numerous federal laws attacking commercial bribery, one cannot say it would offend notions of federalism or burden United States courts with matters beneath them to allow the Sherman Act to also reach this conduct. On the other hand, the presence of these other federal and state laws does not render application of the Sherman Act against commercial bribery pointless. The treble damage private action is a useful supplement to criminal prosecution because it brings to bear the resources of parties with the most immediate stake in (and the most likelihood to become aware of) commercial bribery: the corrupt agent's principal and the briber's competitors.